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IS IT FRAUDULENT PER SE AS TO CREDITORS FOR A VENDOR OF PERSONAL PROPERTY TO IMMEDIATELY CONSTITUTE THE VENDEE HIS BAILEE? The much mooted question in Pennsylvania whether a vendee of goods sold upon credit can redeliver the goods to the vendor, and then immediately accept them on consignment or bailment lease, in order to protect the vendor, has arisen squarely for decision, apparently for the first time, in the recent case of *Gattle* v. *Kremp*, 6 Pa. Super. Ct. 514. The facts there involved were these: A jeweler of Reading, Pa., indebted to a New York creditor, whose claim was being pressed, met him by appointment at an hotel in Reading. At this meeting the claim was adjusted by the return of a portion of the goods originally bought from the creditor, and the delivery of certain other goods belonging to the debtor. These goods were actually delivered to

the creditor, and the indebtedness of the latter cancelled. At the same time and place, and almost immediately after the adjustment of the account, the creditor delivered the goods so received to the debtor, to be by him sold as a consignment account for the creditor. The goods were placed on sale in the debtor's store, with no special mark of identification. Subsequently, another creditor of the debtor obtained judgment on a debt which accrued prior to this transaction, issued execution and levied upon the goods in the debtor's store, including the goods held on consignment.

At the trial of an issue arising under a sheriff's interpleader, the trial judge refused binding instructions to the jury to find for the execution creditor, and charged that "the law cannot undertake to fix any particular time during which a man must have held actual possession of goods in order to constitute a transfer which will be valid, but it requires that the transfer shall have been an actual one, with the right in the transferee of continued possession. If there was a transfer, a legal, valid transfer at the time, then the next question arises, what was the nature of the retransfer of these goods to Burkhart. It is for you to say whether this retransfer was a *bona fide* transfer to him for inspection of the goods, or on consignment to be sold by him on Gattle Brothers' account, as the property of Gattle Brothers . . . If it was a *bona fide* and honest consignment, the goods to be sold as the property of Gattle Brothers, then they remained the property of Gattle Brothers, and this execution could not be lawfully levied upon this property." The jury rendered a verdict for the owner of the consigned goods. The ruling of the trial judge was affirmed by the Superior Court.

With all due respect, it is submitted that the decision is unsound. From the charge of the trial court, and the reasoning of the Superior Court, it is manifest that the real point of the case was overlooked.

Was not the real question involved whether an assignment of personal property is valid against the creditors of the former owner without delivery to, accompanied and followed by continuing possession in the assignee? It should be observed that the property assigned was the absolute property of the assignor, and, instead of it continuing in the possession of the assignee, it was immediately redelivered into the absolute custody of the assignor. There was no absolute, manifest and continuous change of possession.

It is as well settled in Pennsylvania as any proposition can be, that where the possession of personal property does not follow as well as accompany its transfer, it is a fraud in law without regard to the intention of the parties, and becomes a question for the court and not for the jury: *Clow* v. *Woods*, 5 S. & R. 275 (1819); *Stephens* v. *Gifford*, 137 Pa. 219 (1890).

In *Young* v. *M'Clure*, 2 W. & S. 147 (1841), A sold and delivered to B a yoke of oxen upon credit. About an hour afterwards B redelivered the oxen to A, to be used by him until B found a purchaser. About ten days after this transaction they were seized

in execution by a creditor of A. Held, that the leaving of the oxen in A's possession was a fraud *per se* on A's creditors.

In *M'Bride* v. *M'Clelland*, 6 W. & S. 94 (1843), A, being the tenant of B, sold him certain property in payment of his rent. The property was removed to a neighboring house by B for safe keeping. In the course of the same day, and a few days following, all of the property got back again in the possession of A. Held, fraudulent *per se*.

In *Weller* v. *Meeder*, 2 Pa. Super. Ct. 488 (1896), a mother sold certain personal chattels under a bill of sale to her son, resident at a distance. The property was in her possession, on her farm and in her own building. No transfer of possession took place. The son immediately leased the property to his mother, and her apparent possession was uninterrupted. The son never exercised any act of ownership excepting the execution of the papers. Held, that the transaction was fraudulent *per se* as to the creditors of the mother.

How can these cases be distinguished in their facts from the case of *Gattle* v. *Kremp?* The mere form of removing the goods to the hotel and exhibiting them to the transferee cannot distinguish it from *Weller* v. *Meeder*, *supra*. It is no answer to say that an absolute transfer would have defeated the purpose and intention of the parties. Surely, there is more reason to sustain the action of a son in leaving property with his mother, than a creditor who accepts property in payment of his debt and leaves it with his debtor. If the act of the son is fraudulent, much more so should be the act of a creditor. Where the property is capable of an absolute transfer, the mere convenience of the parties will not support it: *Clow* v. *Woods*, *supra*. The parties complied strictly with the law in delivering the property in the first instance to the transferee, and thereby showed that an absolute transfer was both practicable and feasible. There was no practical reason why the possession should not have continued in the transferee. In such a case the transferrer cannot immediately become the bailee of the transferee. "The property," says, Mr. Bigelow "should not at once go back into the possession of the seller; . . . the seller cannot be made immediately the bailee of the buyer without subjecting the transaction to be treated . . . as in fraud of creditors:" Bigelow on Fraud, Vol. II, p. 353.

The learned trial judge, however, charged "that the law cannot undertake to fix any particular time during which a man must have held actual possession of goods in order to constitute a transfer which will be valid, but it requires that the transfer shall have been an actual one, *with the right in the transferee of continual possession.*"

If the want of sufficient possession be a question for the court, how can it be said that the law does not undertake to fix any particular time during which a man must have actual possession. Where the possession has been temporary, the courts have not hesitated to declare the transfer fraudulent: *Miller* v. *Garman*, 69

Pa. 134 (1871); *Garman* v. *Cooper*, 72 Pa. 32 (1875); *Caldwell* v. *Fisher*, 2 W. N. C. 383 (1875).

It may be that where the exclusive possession has continued in the transferee for a considerable period, the question of good faith should be submitted to the jury. This, however, does not disprove that the court may, in a given instance, declare that the attempted transfer is fraudulent *per se*.

Again, is it correct to say that the transferee should have the right of continued possession? The law is clear that the transferee should have the *actual continued possession, and not merely the right of continued possession*.

It cannot be seriously contended that *Gattle* v. *Kremp* can be supported as within the meaning of the apparent exception to the rule, where, from the character and situation of the property, the use being made of it, it is impracticable to insist upon an absolute transfer.

There must, however, be the best delivery that the property is reasonably capable of. The transferee must make a *bona fide* attempt to inform the public of the transfer. The sale of mere merchandise has never been thought to be within this exception: *Prichett* v. *Jones*, 4 Rawle, 259 (1833); *Cunningham* v. *Neville*, 10 S. & R. 201 (1823); *Eckfeldt* v. *Frick*, 4 Phila. 116 (1860).

No one will question that a bailment of personal property is valid in Pennsylvania: *Rowe* v. *Sharp*, 51 Pa. 26 (1865); *Riecker* v. *Koechling*, 4 Pa. Super. Ct. 286 (1897).

Had the bailee in *Gattle* v. *Kremp* been in no way connected with the ownership of the goods prior to their consignment to him, it is obvious that the consignment would have been valid. It is immaterial, therefore, whether the goods were delivered *bona fide* by the debtor to his creditor in discharge of his debt; but the real question was, can the debtor be the bailee of the creditor after such attempted transfer.

The Superior Court, in its opinion, says: "If the right to a continuous possession, with an absolute title, became fixed in Gattle Brothers, this creditor was not injured by their consignment of these goods. His debt had been long overdue, and no false or delusive credit was created. . . . There is no evidence in the case intimating that Kremp knew, or did not know, that his debtor kept or sold goods on consignment. The aim and trend of all the decisions has been to prevent fraudulent impositions on creditors by a misleading possession, but the open, notorious and exclusive possession urged by the appellant would be destructive of all sales under consignment."

This excerpt from the opinion certainly contains some remarkable propositions of law.

If the title of Gattle Brothers was absolute and valid, of course, no one could complain. That, however, was the point in dispute. If *Clow* v. *Woods* is still the law, it is difficult to perceive how Gattle Brothers acquired an absolute and valid title to the goods.

This is the first time, it is believed, that any one has seriously ventured to intimate that a creditor is obliged to show that he was misled by the appearance of ownership through want of possession.

"The creditor's claim rests," says Mr. Bigelow, "upon the debtor's possession. It does not rest upon the creditor's knowledge of that possession; it is not necessary for the creditor to show that he has been deceived by appearances. . . . It is not necessary even that the creditor should have known of the existence of the property before the levy; enough, . . . that the debtor was found in possession:" Bigelow on Fraud, Vol. II, p. 327; see, also, *Martin* v. *Mathiot*, 14 S. & R. 214 (1825).

Consignment accounts are perfectly legal in Pennsylvania; and, in view of this, it is difficult to appreciate the force of the suggestion that any other conclusion in *Gattle* v. *Kremp* would have been destructive of consignment accounts.

Even though a creditor's claim arises prior to the acquisition by the debtor of the property in question, yet, if it be unpaid at the time of the attempted transfer of the property to another, he has a right to question the validity of the transfer. The fact of being an existing creditor is the basis of his right to attack the transfer for want of change of possession: *Buckley* v. *Duff*, 19 W. N. C. 166, 168 (1886).

While it may be impossible to reconcile all the apparently discordant decisions on this much vexed question, it is confidently believed nevertheless that the decision in *Gattle* v. *Kremp* is a wider departure from the true doctrine of *Clow* v. *Woods* than any case to be found in the books. The decision is especially unfortunate in a state where the means of preferring creditors are already too much favored to be consistent with a sound commercial morality.

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DIVORCE; MARRIAGE; CONFLICT OF LAW; STULL'S ESTATE, 183 Pa. 625 (Jan. 3, 1898). The facts were that the decedent had married B, who still survived. In February, 1894, the wife obtained a decree of absolute divorce from him on the ground of adultery with one C. In April, 1894, A and C, both citizens of Pennsylvania, went to Maryland and were there united in marriage. They at once returned to Pennsylvania and lived together as man and wife until his death in June, 1895. It was conceded that the decedent and C his paramour went into Maryland to be there married, for the express purpose of evading the law of Pennsylvania, which, after a decree of divorce on ground of adultery, prohibits marriage with the paramour during the life of the innocent party.

It was also conceded that by the law of Maryland there is no such restriction. The question to be decided was whether the Maryland marriage was valid. The court, after a very thorough and interesting veview of the cases bearing on this subject, decided that the marriage performed in Maryland was invalid. This decision seems to be a very proper one and is in accord with good

morals and a sound public policy. It is also supported by the great weight of authority, both English and American: *Sussex Peerage Case*, 11 Clarke & Fin, 85 (1844); *Brook* v. *Brook*, 9 H. of L. Cases, 212 (1862); *LeBreton* v. *Nonchet*, 3 Mart. (La.) 60 (1813); *Williams* v. *Oates*, 5 Ire. (N. C.) 535 (1845); *Dupre* v. *Executor of Boulard*, 10 La. 411 (1855); *State* v. *Kennedy*, 76 N. C. 251 (1877); *Kinney* v. *Commonwealth*, 30 Grat. (Va.) 858 (1878); *Pennegar and Haney* v. *State*, 87 Tenn. 244 (1889). The leading text-book writers on the conflict of laws concur with the above cases: *Story's Confl. of Laws*, secs. 86 and 87; *Wharton's Confl. of Laws*, sec. 159.

Contrary ideas are held, however, in a few of the states: *Medway* v. *Needham*, 16 Mass. 157 (1819); *Putman* v. *Putman*, 8 Pick. (Mass.) 433 (1829); *Stevenson* v. *Gray*, 17 B. Mon. (Ky.) 193 (1856); *VanVoorhis* v. *Brintall*, 86 N. Y. 18 (1881); overruling *Marshall* v. *Marshall*, 2 Hun. (N. Y.) 238 (1874); *Moore* v. *Hegeman*, 92 N. Y. 521 (1883).

INNKEEPER; LIEN ON DRUMMER'S SAMPLES. In *Torrey et al.* v. *McClellan et al*, 43 S. W. 641 (Court of Civil Appeals of Texas, Nov. 13, 1897), it was held that the innkeeper's lien did not extend to drummer's samples, when it appeared that the innkeeper knew all along that the goods were the property not of the drummer, but of his employer.

Before the decision in the present case this question had arisen only twice. In *Covington* v. *Newberger*, 99 N. C. 523 (1888), the same conclusion as in the principal case was reached. See also *Broadwood* v. *Granaray*, 10 Exch. 417 (1854). The next question arose in *Robins & Co.* v. *Gray* (1865), 2 Q. B. 501, and the result is in open conflict with *Covington* v. *Newberger*, *supra*. In that case Lord Esher held that the question of the innkeeper's knowledge as to the ownership of the samples is immaterial. It is obviously impossible to harmonize these two lines of cases. It is respectfully submitted, however, that as the innkeeper is bound to receive the goods of a guest without inquiries as to his title [*Gordon* v. *Silber*, 25 Q. B. D. 491 (1890)], the innkeeper should not be deprived of his lien even if he knows the goods to belong to a third party.

BOOK REVIEWS.

INTRODUCTION TO THE STUDY OF LAW. By EDWIN H. WOODRUFF, Professor of Law in Cornell University, College of Law. New York: Baker, Voorhis & Co. 1898.

This is a most excellent little book filling a long felt want. It begins with a description of the Scope of the Law. There is a chapter on "How and Where to Find the Law," which describes the different classes of legal books and their uses. Chapter III, on "The Operation of the Law," is a very carefully prepared and simple account of how law grows. The last chapter on Courts